LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
JUN 2 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 149

HUBERT WREN, *Petitioner*,

vs.

STATE OF WASHINGTON, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

FRANCIS L. BANNON
916 Washington Bldg.
Tacoma 2, Washington

MACK E. CALL
1113½ A Street
Tacoma 2, Washington
Attorneys for Petitioner

LORIMER I. LANGLOW, PRINTER, TACOMA, WASHINGTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

HUBERT WREN, *Petitioner*,

vs.

STATE OF WASHINGTON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

FRANCIS L. BANNON
916 Washington Bldg.
Tacoma 2, Washington

MACK E. CALL
1113½ A Street
Tacoma 2, Washington
Attorneys for Petitioner

LORIMER I. LANGLOW, PRINTER, TACOMA, WASHINGTON

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	3
Laws Involved	3
Statement of the Case	4
Federal Question Raised	5
Reasons for Granting Writ	5
Opinion and Judgment of the Lower Court—Exhibit A	7
Order Denying Petition for Rehearing—Exhibit B	10
Judgment of the Trial Court—Exhibit C	11

STATE STATUTES

RCW 9.66.010	4
RCW 47.20.280	4
RCW 4.16.020	4

STATE CONSTITUTION

Ninth Amendment	3

FEDERAL STATUTES

Judicial Code 28 USC Sec 1257	2

FEDERAL CONSTITUTION

Fifth Amendment	3
Fourteenth Amendment	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. _____

HUBERT WREN, *Petitioner*,

vs.

STATE OF WASHINGTON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

TO: The Honorable Earl Warren, Chief Justice of the United States of America, and to the Honorable Associate Justices of the Supreme Court of the United States.

The Petition of Hubert Wren for a Writ of Certiorari to be directed to the Supreme Court of the State of Washington, to review a judgment of that Court entered on the 20th day of February, 1958, (a re-hearing denied on the 8th day of April, 1958) in favor of Respondent herein and against Petitioner herein, respectfully shows:

CITATIONS TO OPINIONS BELOW

That the decision delivered by the Court below is *State of Washington v. Hubert Wren*, 151 Wash. Decisions pg. 716, and the Order denying Petition for Rehearing is reported in 152 Wash. Decisions pg. 92;

copies of the said decision and Order denying Petition for Rehearing are attached hereto, marked Exhibit A and Exhibit B respectively.

JURISDICTION

That the jurisdictional grounds are as follows:

a. Date of judgment and time of entry of judgment—February 20, 1958.

b. Date of Order denying Rehearing—April 8, 1958.

c. The Statutory provision believed to confer on the above entitled Court jurisdiction to review the judgment or decree in question by Writ of Certiorari is found in Judicial Code, 28 USC Sec. 1257 as follows:

"(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by Writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the State in which a decision could be had where is drawn a question the validity of a treaty, or Statute of United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is especially set up or claimed by either party, under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained and where it is denied."

QUESTION PRESENTED

That the question presented for review is as follows:

> Can the State of Washington acquire an easement for highway purposes by prescription or public user, or is it limited to acquisition by the method of condemnation, in view of the limitation contained in the Fifth Amendment to the United States Constitution that no private property shall be taken for public use without just compensation, and in the Fourteenth Amendment that no State shall deprive any person of life, liberty or property without due process of law.

LAWS INVOLVED

That the constitutional provisions relied upon are the quoted portions of the following United States Constitutional provisions:

> Fifth Amendment: "* * * nor shall private property be taken for public use, without just compensation."
>
> Fourteenth Amendment: Article 1 "* * * nor shall any state deprive any person of life, liberty, or property without due process of law; * * *"

The corresponding provision in the Constitution of the State of Washington is Amendment 9, (Vol. 0 Revised Code of Washington):

> "No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner."

The pertinent portion of the Statute of the State of Washington which appellant is accused of violating

is RCW 9.66.010, which may be found in Volume 1 of Revised Code of Washington:

> "Every act unlawfully done and every omission to perform a duty, which act or omission * * * (3) Shall unlawfully interfere with, befoul, obstruct, or tend to obstruct, or render dangerous for passage, a * * * street, alley or *highway;* * * * Shall be a public nuisance."

Also pertinent are the following statutes, RCW 47.20.280 (Vol. 4 Revised Code of Washington):

> "Secondary state highways as branches of primary state highway No. 5 are established as follows: Secondary State Highway No. 5H; beginning at a junction with primary state highway No. 5 in the vicinity south of Tacoma, thence in a southwesterly direction by way of McKenna, Yelm, and Rainier, to Tenino on primary state highway No. 1; * * *"

and RCW 4.16.020 (Vol. 1 Revised Code of Washington):

> "The period prescribed . . . for the commencement of actions shall be as follows: Within ten years: Actions for the recovery of real property * * *"

STATEMENT OF THE CASE

That the facts material to the question presented for review are as follows:

> The appellant was convicted and sentenced April 2, 1957 in the Superior Court for Pierce County, State of Washington (Judgment appended and marked Exhibit C) for the commission of a public nuisance in violation of RCW 9.66.010, which is set forth above. For the purpose of this review it is conceded that the alleged acts

of the appellant were sufficient to constitute a public nuisance *if they were committed on a public highway*. The alleged acts occurred November 5, 1956 on what the State legislature had previously in 1937 sought to establish as secondary state highway 5-H by the passage of RCW 47.20.280 cited above. This alleged highway runs at this point across land owned by appellant. The State has never acquired or attempted to acquire the land traversed by the highway by condemnation proceedings, but the trial court found that the state has maintained the same as a public road and it has been used by the public continuously since before 1940, and had therefor acquired same by prescription (See RCW 4.16.020 above).

FEDERAL QUESTION RAISED

That the Federal question was first raised by appellant on his Petition for Rehearing to the State Supreme Court (Par. II, pg. 1 and 2), and said petition was merely denied without elaboration by said court on April 8, 1958 the constitutional question was raised in the trial court under Amendment 9 to the Constitution of the State of Washington cited above.

REASONS FOR GRANTING WRIT

That Petitioner's argument for the allowance of this Writ is as follows:

The wording of the Fifth and Fourteenth Amendments to the Federal Constitution do not permit the acquisition of private property for public use by prescription or public user, but only by method of condemnation. That the prior decisions of the Supreme Court of the State of Washington have consistently held to the contrary, but should be overruled as contrary to the Federal Constitution; that neither the Washington cases,

nor the cases in other jurisdictions have considered this question from the standpoint of the Federal Constitution, (or even their State Constitutions) and it is important that there be on record a decision from the highest court in the land. It is the petitioner's position that the guaranties and rights secured to each citizen by the Bill of Rights may not be made to yield to mere convenience and public welfare; that the recognized exceptions to the requirement for compensation proceedings are not here present, and that the State cannot properly here say that its alleged prescriptive title was acquired under the police power. Petitioner believes this to be a case of first instance before this Court.

WHEREFORE petitioner prays that his writ be granted.

Respectfully submitted,

FRANCIS L. BANNON
916 Washington Bldg.
Tacoma 2, Washington

MACK E. CALL
1113½ A Street
Tacoma 2, Washington
Attorneys for Petitioner

Service acknowledged and

copy received this ____ day
of June, 1958

PROSECUTOR OF PIERCE COUNTY
Respondent

By_____
Deputy

EXHIBIT A

[No. 34249. Department One. February 20, 1958.]

THE STATE OF WASHINGTON, *Respondent*, *v.* HUBERT WREN, *Appellant.*[1]

[1] Easements—Highways—Establishment by Prescription—Validity.
[2] Nuisance—Public Nuisances—Criminal Prosecutions — Evidence — Sufficiency.

Appeal from a judgment of the superior court for Pierce County, No. 32561, Hale, J., entered April 2, 1957, upon a trial and conviction of the commission of a public nuisance. Affirmed.

Mack E. Call, for appellant.

John G. McCutcheon and *Charles R. Johnson*, for respondent.

FINLEY, J.—The appellant was convicted and sentenced in the superior court for Pierce County for the commission of a public nuisance in violation of RCW 9.66.010. The pertinent part of the statute reads as follows:

"Every act unlawfully done and every omission to perform a duty, which act or omission

". . .

"(3) Shall unlawfully interfere with, befoul, obstruct, or tend to obstruct, or render dangerous for passage, a . . . street, alley or highway; . . .

"Shall be a public nuisance."

Witnesses for the state testified that appellant placed a post in a strip of black-top which had been laid to widen the center concrete portion of secondary state highway 5-H; that a no-trespassing sign had been affixed to the post; that a post hole had been dug in the black-top strip on the opposite side of the highway; that appellant had in his possession sufficient telephone wire to stretch across the highway between two posts; that appellant was observed waving a red flag at southbound highway traffic and pointing to the no-trespassing sign; that appellant temporarily placed a

small tree or limb—approximately four inches in diameter at the butt and twelve feet in length—across the highway. It is a matter of public record that the highway in question has been established as secondary state highway 5-H by the state legislature. (See RCW 47.20.280.)

In this appeal, appellant first contends that his conduct and the results thereof were not *unlawful.* He bases this contention (a) on the fact that he owns the land traversed by the highway, and (b) upon the assumption that the traveling public and the state have acquired no interest or rights in the land for highway or other purposes. In support of the latter proposition, he relies upon amendment nine to the state constitution (amending Art. I, § 16), which, in part, reads:

". . . No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, . . ."

[1] Under appellant's interpretation of the above language of amendment nine, an easement for highway purposes cannot arise by prescription or public user, but only by the method of condemnation. Counsel for appellant forthrightly concedes that this interpretation of amendment nine is contrary to decisions of this court supporting the right of the public and the state to acquire an easement for highway purposes by prescription. See *Smith v. Mitchell,* 21 Wash. 536, 58 Pac. 667; and *King County v. Hagen,* 30 Wn. (2d) 847, 194 P. (2d) 357. He asks, however, that such cases be reconsidered and overruled, and that we now hold that an easement for highway purposes cannot arise by prescription. We are not convinced of the soundness of counsel's suggestion and refuse to accede. The evidence shows that the particular section of secondary state highway 5-H has been maintained as a public road and has been used by the public continuously since before 1940. Appellant's contentions as to this aspect of this case are untenable.

[2] Appellant's second contention is that his acts and the results thereof did not in fact "interfere with, befoul, obstruct, or tend to obstruct, or render dangerous for passage, a . . . street, alley or highway." In the light of the state's evidence (summarized hereinabove), we are convinced that appellant's interpretation of the facts is untenable.

The judgment of the trial court should be affirmed. It is so ordered.

HILL, C. J., MALLERY, OTT, and HUNTER, JJ., concur.

EXHIBIT B

[No. 34249. April 8, 1958.]

THE STATE OF WASHINGTON, *Respondent*, v. HUBERT WREN, *Appellant*.

[Reported in 151 Wash. Dec. 716.]

Petition for rehearing denied.

EXHIBIT C

In the Superior Court of the State of Washington
IN AND FOR PIERCE COUNTY

STATE OF WASHINGTON, *Plaintiff*, v. HUBERT R. WREN, *Defendant*.

No. 32561

JUDGMENT AND SENTENCE

This matter coming on regularly for hearing in open court on the 2nd day of April, 1957 the defendant Hubert R. Wren and Mack Call, his attorney, appearing, and the State of Washington appearing by S. J. Witt, Deputy Prosecuting Attorney for Pierce county, and the defendant having been convicted of the crime of Creating a Public Nuisance from which justice court conviction the defendant has appealed, the defendant having been found guilty of said charge upon trial in the Superior Court this day, and the Court having ascertained the true name of the defendant, and having interrogated and informed him of the nature of the charge and that he might have one day's time in which to enter his plea, and having advised the Defendant that he was entitled to trial by jury, and to the services of an attorney and that the Court would appoint counsel for him at the expense of the county if he so desired and was without funds, and it appearing and the Court having been advised by the Defendant that he understood the nature of the charge and was ready and willing to enter his plea, and it appearing and the Court having determined that the Defendant is capable of and is exercising a free and rational choice, the Defendant was then arraigned and entered his plea of not guilty to each crime charged in the complaint. Whereupon, the defendant being asked if there were any causes that Judgment should not be pronounced and no sufficient cause being sworn, and the Court and Defendant being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That said Defendant is guilty of the crime of Creating a Public Nuisance and that he shall be punished by confinement in the Pierce County Jail for a term of not more than sixty (60) days and to pay the costs of this prosecution taxed at $_____. The said sentence_____to run_____. The said Defendant is now hereby committed to the custody of the sheriff of aforesaid county to be detained and by him delivered into the custody of the proper officers for transportation to and confinement in, said institution.

Signed this 2nd day of April, 1957, in the presence of said Defendant.

Frank Hale, *Judge.*

Filed in County Clerks Office, Pierce County, Washington, April 2, 1957. Robert L. Dykeman, Clerk. By R. G. Dep.